EPT'S RED-LINE AND COMMENTARY ON DDTC'S PROPOSED AMENDMENT TO USML CATEGORY VIII (73 Fed. Reg. 19778, 19780 (Apr. 11, 2008))

May 12, 2008

Sec. 121.1 General. The United States Munitions List.

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Category VIII--Aircraft and Associated Equipment

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(b) Military aircraft engines, except reciprocating engines, specifically designed or modified for the aircraft in paragraph (a) of this category, and all specifically designed military hot section components (i.e., combustion chambers and liners; high pressure turbine blades, vanes, disks and related cooled structure; cooled low pressure turbine blades, vanes, disks and related cooled structure; cooled augmenters; and cooled nozzles) and digital engine controls (e.g., Full Authority Digital Engine Controls (FADEC) and Digital Electronic Engine Controls (DEEC).

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(h) Except as noted below, c~~C~~omponents, parts, accessories, attachments, and associated equipment (including ground support equipment) specifically designed or modified for the articles in paragraphs (a) through (d) of this category, excluding aircraft tires and propellers used with reciprocating engines.

Note: The Export Administration Regulations (EAR) administered by the Department of Commerce control any part~~, or~~ component (including propellers), or other item designed ~~exclusively~~ for civil, non-military aircraft (see Sec. 121.3 for the definition of military aircraft) or~~and~~ civil, non-military aircraft engines

Comment [k1]: This addition is necessary to avoid an inconsistency between subcategory VIII(h) and the Note because, under the Note, a part that was specifically designed for a military aircraft is still EAR-controlled if it meets the three-part test.

Comment [k2]: The EAR uses the term "item" instead of "parts" or "components." Thus, the insertion of the word "item" here is to make the description of what the EAR controls consistent with the wording in the EAR. See EAR §§ 734.3 and 772.1. Otherwise, it suggests that the EAR might not control items (other than parts and components) that were specifically designed for dual-use end-items or civil applications.

Comment [k3]: The word "exclusively" needs to be removed because it erroneously suggests that parts specifically designed for both military and civilian aircraft – referred to in the EAR as "dual-use" items – are not subject to the EAR. Although it does not amend the ITAR, readers will be led to believe that DDTC holds a contrary position.

Also, a non-SME component or part (as defined in §§~~Sec.~~ 121.8(b) and (d) of this subchapter) that is not controlled under another category of the USML, that:

(a) Is standard equipment;

(b) is covered by a civil aircraft type certificate (including amended type certificates and supplemental type certificates) issued, accepted, or validated by the Federal Aviation Administration or an FAA-recognized NATO or major non-NATO ally foreign government aviation authority (e.g., EASA) for a civil, non-military aircraft (this expressly excludes military aircraft certified as restricted and any type certification of Military Commercial Derivative Aircraft; and

(c) is an integral part of such civil aircraft,

is subject to the ~~control~~ jurisdiction of the EAR.

In the case of any part or component designated as SME in this or any other USML category, a determination that such item may be excluded from USML coverage based on the three criteria above always requires a commodity jurisdiction determination by the Department of State under Sec. 120.4 of this subchapter. The only exception to this requirement is where a part or component designated as SME in this category was integral to civil aircraft prior to [effective date of the final rule]. For such a part or component, U.S. exporters are not required to seek a commodity jurisdiction determination from State, unless doubt exists as to whether the item meets the three criteria above (See §§~~Sec.~~ 120.3 and Sec. 120.4 of this subchapter).

Also, U.S. exporters are not required to seek a commodity jurisdiction determination from State regarding any non-SME component or part (as defined in ~~Sec.~~§§ 121.8(b) and (d) of this subchapter) that is not controlled under another category of the USML, unless doubt exists as to whether the item meets the three criteria above (See §§~~Sec.~~ 120.3 and Sec. 120.4 of this subchapter).

These commodity jurisdiction determinations will ensure compliance with this section and the criteria of Section 17(c) of the Export Administration Act of 1979. In determining whether the three criteria above have been met, consider whether the same item is common to both civil and military applications without modification of the item's form, fit, or function. Some examples of parts or

Comment [k4]: The FAA routinely recognizes and accepts certifications originally issued by recognized foreign aviation authorities, such as EASA. Those validated foreign certifications are deemed by the FAA to meet the same criteria imposed for FAA-issued certifications.. Thus, they should be afforded equal treatment. This addition will not mean that any part certified by a foreign aviation authority is per se EAR controlled, only that it satisfies this prong of the Note's test. The NATO and non-NATO allies are also already specifically identified in the ITAR as worthy of receiving special treatment under the ITAR. There is no policy reason to treat them differently for purposes of this Note.

Comment [k5]: Many U.S. suppliers, including Korry, make and sell parts for non-U.S. aircraft companies such as Airbus. Thus, it is important that this prong of the test not be limited just to the U.S. civil aviation authority, but also trust-worthy foreign government aviation authorities with which the FAA has reciprocal agreements. Otherwise, there will be a need to increase substantially the number of CJ requests submitted with respect to parts exported from the U.S. to foreign manufacturers that are certified by allied foreign authorities. In addition, the principal non-US market for aircraft parts and components is Europe. It would not make sense to exclude parts manufactured for European companies from the scope of this note.

Comment [k6]: This addition states explicitly DDTC's long-standing position that an item's jurisdictional status is not affected by a modification that does not affect the item's form, fit, or function. These terms are defined in sec. 120.4, so their addition will not create any ambiguity. The addition also helps clarify the scope of what types of modifications may cause an item's jurisdictional status to change.

components that are not common to both civil and military applications are tail hooks, radomes, and low observable rotor blades.

"Standard equipment" is defined as a part or component manufactured in compliance with an established and published industry or manufacturer's specification or standard or an established and published government specification or standard (e.g., AN, MS, NAS, TSO, or SAE). A part covered by a Parts Manufacturer Approval, a Production Certificate, or a Technical Standard Order is "covered by a civil aircraft type certificate" and is, thus, "standard equipment."

Parts and components that are manufactured and tested to established but unpublished (e.g., proprietary) ~~civil aviation~~ ~~industry~~ manufacturer's specifications or~~and~~ standards are also "standard equipment," e.g., pumps, actuators, switches, and generators.

Comment [k7]: This insert is necessary because many civil aircraft and civil aircraft parts manufacturers publish their own specifications for their own products. They are, thus, not "industry" standards.

Comment [k8]: TSOs, Technical Standard Orders, are common FAA-published specifications that provide minimum performance standard for specified materials, parts and appliances used on civil aircraft. Because they are so common, they should be referenced here for the sake of clarity.

Comment [k9]: This is a correct statement of the law but parts manufacturers may be unaware of it when reading the proposed note. Thus, for the sake of clarity, we suggest that DDTC add it in to the text of the note.

Comment [k10]: The addition of the word "proprietary" is merely to give the reader a common example of an unpublished specification.

Comment [k11]: "Civil aviation" should be removed from this sentence to (a) make it consistent with the standard pertaining to published specifications (which is not so limited) and (b) account for the fact that many parts used on civil aircraft are manufactured and tested to generic parts specifications and standards, which are not necessarily "civil aviation" specifications of standards. For example, a bolt used on a civil aircraft may be tested to a specification for bolts generally and, although used on an aircraft, may not refer to civil aircraft in the standard.

Comment [k12]: The word "industry" needs to be removed because it does not make sense in this context. If the spec if unpublished, it cannot be, by definition, an "industry" specification. It can only be a "manufacturer's" specification.

Comment [k13]: Korry proposes adding the word "switches" here to remove the suggestion that only larger items, such as pumps, can be "standard" equipment if they meet the requirements of the definition.

~~A part or component is not standard equipment if there are any performance, manufacturing or testing requirements beyond such specifications and standards.~~ Simply testing a part or component to meet a military specification or standard does not in and of itself change the jurisdiction of such part or component ~~unless the item was designed or modified to meet that specification or standard.~~

Integral is defined as a part or component that is installed in the aircraft or authorized for installation under civil airworthiness regulations of NATO and non-NATO allies (e.g., FAA- or EASA-approved spares and parts in the supply chain).

When ~~In~~ determining whether a part or component may be considered as "standard equipment" and "integral" to a civil aircraft (e.g., latches, fasteners, grommets, and switches) it is important to review carefully all of the criteria noted above. For example, a part approved solely on a non-interference/provisions basis under a type certificate issued by the Federal Aviation Administration would not qualify. Similarly, unique application parts or components not integral to the aircraft would also not qualify.

Comment [k14]: The entire first sentence needs to be removed because civil aircraft parts are routinely tested and manufactured beyond the applicable specification for purely civil purposes, such as (a) confirming that a part certified for use on one part of an aircraft may be used in a more environmentally harsh portion of the aircraft, (b) satisfying longer warranty obligations; (c) "lifeing" the part to see how long it will last; (d) being able, for marketing reasons, to state to potential customers that the part is reliable because it exceeds specifications; and (e) confirming, particularly for new parts, that there is a margin of safety beyond the minimum specs, which is usually done through destructive testing. The proposed sentence would take all of these and other similarly purely civilian situations out from consideration of the definition of "standard equipment."

Comment [k15]: This clause needs to be removed because civil aircraft parts are often designed or modified to meet military specifications for purely civilian purposes and without any military applications in mind. Military specs are commonly used as civil aircraft industry standards for all the reasons described in the previous note. Leaving the proposed clause in would preclude the application of the note to parts designed or modified for civilian or dual-use purposes if the applicable specification happened to be a mil spec.

Comment [k16]: This edit is necessary in order to remove the implication of the proposed wording that a part or component is "integral" only if it is actually within – "installed in" -- the aircraft. Such an interpretation would lead to the illogical conclusion that a part or component could be EAR-controlled when inside the civil aircraft but potentially ITAR-controlled when outside the aircraft, such as a spare. The proposed phrase resolves this spares issue by limiting the definition of "integral" to those parts *authorized for* installation in civil aircraft. The edit also does not limit this note only to FAA certified parts.